



DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket Nos. FMCSA-2012-0332; FMCSA-2013-0122; FMCSA-2013-0123; FMCSA-2013-0124; FMCSA-2015-0326; FMCSA-2015-0328; FMCSA-2015-0329; FMCSA-2016-0004; FMCSA-2017-0058; FMCSA-2017-0059; FMCSA-2017-0060; FMCSA-2017-0061; FMCSA-2018-0135; FMCSA-2018-0138]

Qualification of Drivers; Exemption Applications; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions for 24 individuals from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these hard of hearing and deaf individuals to continue to operate CMVs in interstate commerce.

DATES: The exemptions were applicable on August 22, 2022. The exemptions expire on August 22, 2024.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200 New Jersey Avenue SE, Room W64-224, Washington, DC 20590-0001, (202) 366-4001, fmcsamedical@dot.gov. Office hours are from 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Comments

To view comments go to www.regulations.gov. Insert the docket number (FMCSA-2012-0332, FMCSA-2013-0122, FMCSA-2013-0123, FMCSA-2013-0124, FMCSA-2015-0326, FMCSA-2015-0328, FMCSA-2015-0329, FMCSA-2016-0004, FMCSA-2017-0058, FMCSA-2017-0059, FMCSA-2017-0060, FMCSA-2017-0061, FMCSA-2018-0135, or FMCSA-2018-0138) in the keyword box, and click “Search.” Next, sort the results by “Posted (Newer-Older),” choose the notice posted August 17, 2022, and click “Browse Comments.” If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

B. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption requests. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov. As described in the system of records notice DOT/ALL 14 – Federal Docket Management System (FDMS), which can be reviewed at <https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices>, the comments are searchable by the name of the submitter.

II. Background

On August 17, 2022, FMCSA published a notice announcing its decision to renew exemptions for 24 individuals from the hearing standard in 49 CFR 391.41(b)(11) to operate a CMV in interstate commerce and requested comments from the public (87 FR 50688). The public comment period ended on September 16, 2022, and four unique comments were received.

FMCSA has evaluated the eligibility of these applicants, evaluated the comments received, and determined that renewing these exemptions would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with § 391.41(b)(11).

The physical qualification standard for drivers regarding hearing found in § 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.

This standard was adopted in 1970 and was revised in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid (35 FR 6458, 6463 (Apr. 22, 1970) and 36 FR 12857 (July 8, 1971), respectively).

III. Discussion of Comments

Summary of Comments

FMCSA received four unique comments in these consolidated proceedings. One is from United Parcel Service, Inc. (UPS) in opposition to FMCSA's decision to renew a hearing exemption for Mr. Quinton Murphy, an employee.¹ Because Mr. Murphy was not able to meet FMCSA's hearing standard, he was unable to obtain a Medical Examiner's Certificate, making him not physically qualified for any driving of a CMV with UPS. In 2014, Mr. Murphy applied for a Federal hearing exemption and was issued one in 2015. Mr. Murphy has since renewed his hearing exemption multiple times. Mr. Murphy applied for driving positions at UPS and UPS allowed him to take the preliminary road

¹ The UPS comment is available at <https://www.regulations.gov/comment/FMCSA-2013-0124-0031>.

test that applicants must pass before starting driver training. According to UPS, Mr. Murphy failed that test on five different occasions between 2014 and 2018. UPS then adopted a policy in 2019 providing it would not accept the Medical Examiner's Certificates that must be accompanied by hearing exemptions. UPS states that "anything less than the hearing requirement set forth in the Safety Regulations would amount to an unacceptable experiment with safety and would conflict with the company's own high safety and training standards." At that time, Mr. Murphy had another pending application for a driving position. UPS denied that application because Mr. Murphy could not obtain a Medical Examiner's Certificate without a hearing exemption. UPS contends that "FMCSA has not made the statutorily required safety findings to support the granting of a renewed exemption to Mr. Murphy."

UPS' position is that: "The grant of another categorical hearing exemption to Mr. Murphy poses a serious safety risk and, given the lack of evidence to support a finding that an exemption will maintain or improve safety, would be inconsistent with federal law." UPS supplemented its comment with 15 exhibits to support its opposition to renewing Mr. Murphy's hearing exemption and to oppose the overall basis for the exemptions.

According to UPS, "FMCSA opaquely asserts" that each applicant included in the August 17, 2022 notice has satisfied the renewal conditions for obtaining an exemption, but does not specify the renewal conditions. UPS questions the use of driving records relating to personal vehicles for applicants for a hearing exemption. It asserts that FMCSA's consideration of such driving records when issuing exemptions is not a reliable proxy for assessing an individual's ability to operate a CMV safely.

UPS states that Mr. Murphy is completely deaf and has limited ability to read or communicate in English. UPS continues that Mr. Murphy is unable to participate in critical on-road training that involves real-time communication while driving.

UPS provides that “FMCSA’s decision to issue an exemption on such a scant evidentiary record with so little reasoning is arbitrary and capricious. And by issuing a renewed exemption *before* providing an opportunity for public comment, FMCSA has only compounded these problems. The agency has made a significant safety determination that is not provided for by statute before considering outside evidence [...] regarding the safety risks posed by Mr. Murphy. Such absence of evidence is insufficient for an affirmative safety finding” (original italics). It also provides a lengthy discussion regarding an evidence report titled “Hearing, Vestibular Function, and Commercial Motor Driving Safety” that was presented to FMCSA in August 2008 and other literature. UPS states that the 2008 report did not find any affirmative evidence supporting the grant of exemptions to non-hearing individuals and that FMCSA failed to identify other current medical literature used to support its decision to grant these exemptions.

UPS indicates that FMCSA has not addressed a 2016 study that UPS states reports “that drivers with hearing loss are up to 3.1 times more likely to be involved in an accident and 10 times more likely to be injured.”² It also states that “FMCSA has never acknowledged or addressed a recent analysis of its hearing-exemption program undertaken at the agency’s own behest that confirms the absence of empirical support for the agency’s position.” UPS contends that the 2020 study found no statistically significant evidence that CMV operators with profound hearing loss are equally as safe as those who meet FMCSA’s standard. It states that “despite the research demonstrating the vital link between hearing and safety, and despite the absence of any current data calling that link into doubt, FMCSA has chosen to press forward granting exemptions without further empirical inquiry. It has elected not to commission a further study to assess

² See UPS comment at 14, citing Gordon M. and Pearson J., *Preliminary Analysis of Roadway Accidents Rates for Deaf and Hard-of-Hearing Drivers—Forensic Engineering Application*, 33 J. Nat’l Academy of Forensic Eng’rs 47 (2016).

whether exempting non-hearing drivers from the Safety Regulations’ standards is likely to achieve the same or a greater level of safety.” UPS asserts that “FMCSA’s track record of reflexively granting one-size-fits-all hearing exemptions to all who seek them is particularly concerning and demonstrates a lack of rigor in conducting the review the statute mandates and applying the safety-first standard Congress prescribed.” UPS suggests the need for further research and states that “FMCSA’s decision to issue exemptions to individuals like Mr. Murphy is both unreasonable and inconsistent with FMCSA’s statutory mandates.” UPS concludes that Mr. Murphy’s exemption is improper and must be rescinded.

An anonymous comment was submitted that does not support granting a hearing exemption to Mr. James Queen.³ The commenter states that Mr. Queen “has extra health issues that could not show on his medical card.” The commenter requests that FMCSA review Mr. Queen’s medical care and reports before granting him an exemption.

The Commercial Vehicle Training Association (CVTA) also submitted comments in these proceedings.⁴ CVTA does not address the merits of any individual renewal application. Instead, CVTA states that “without a comprehensive understanding of the Agency’s reasoning behind providing certain exemptions and additional research on the subject, our members are not able to provide a consistent standard without sacrificing safety or opening themselves up to liability.”

CVTA also states “that not enough research has been made available to the public on this matter and the Agency has not been transparent with their standards of how exemptions are granted or extended.” It requests additional research, public data, and guidance on this matter. CVTA says that the Agency vaguely asserted that recent

³ This comment was submitted in multiple dockets in this proceeding, see, e.g., <https://www.regulations.gov/comment/FMCSA-2017-0059-0020>.

⁴ CVTA’s comment was submitted in multiple dockets in this proceeding, see e.g., <https://www.regulations.gov/comment/FMCSA-2013-0122-0022>.

decisions to renew some exemptions “were based ‘on their merits.’” CVTA continues that in “order for an agency’s assessment to not run afoul of the ‘arbitrary and capricious’ standard for judicial review set forth by the Administrative Procedure Act (APA), the Agency must engage in reasoned decision making by examining the relevant data and articulating a satisfactory explanation for its action. Further, there must be a rational connection between the facts found and the choice made. CVTA does not believe that FMCSA has satisfied this standard.”

CVTA also states that “FMCSA provided little to no relevant data other than noting that they ‘searched for crash and violation data’ and ‘driving records from the State Driver’s Licensing Agency’ when making the decision.” CVTA continues that it understood this database has never been a factor in determining whether a hearing-impaired commercial driver’s license (CDL) driver meets the medical fitness examination required by the FMSCRs to operate a CMV. CVTA states that the “Agency did not articulate a satisfactory explanation of why this data was relevant when determining if this exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.”

In addition, CVTA states that it “does not feel the statutory requirements have been met by the extension of these exemptions, there has been a lack of transparency in the decision making, and the regulation has not been articulated in a way that can produce a reliable and consistent standard our members can rely on when making accommodations.” Finally, CVTA states it “cannot support this rule without additional research, data, and an articulated explanation on the subject that can be consistently employed throughout the industry.”

An anonymous comment was submitted opposing CVTA's comments.⁵ The commenter states that FMCSA's search for crash and violation data and driving records proves that there were few or no crashes reported. According to the commenter, that also proves that passing FMCSA's hearing test is not required to operate a CMV and that the drivers who applied for an exemption are safe drivers.

FMCSA Response to Comments

The Agency's decision regarding exemption applications is based on relevant medical information and literature indicating whether a licensed driver with the medical condition could operate safely, which includes the specific bases discussed in a December 29, 2017 *Federal Register* notice (82 FR 61809). FMCSA also considers its experience with hearing exemption holders.

FMCSA supports a decision to grant a hearing exemption by reviewing each applicant's driving record found in the Commercial Driver's License Information System, for CDL holders, as well as inspections recorded in the Motor Carrier Management Information System. For non-CDL holders, the Agency reviews the driving records from the State Driver's Licensing Agency. The records for each applicant who has been granted a hearing exemption demonstrate that the driver has a safe driving history.

FMCSA has found that review of driving records relating to personal vehicles is suitable to predict future driving performance in CMVs for the purpose of evaluating hearing exemption applications. In some instances that is the only driving experience available to the Agency. Applicants applying for hearing exemptions are very diverse in that some have been deaf or hard of hearing since birth, some suddenly became deaf or hard of hearing due to trauma or a medical condition, and others gradually became deaf

⁵ This comment was submitted in multiple dockets in this proceeding, see, e.g., <https://www.regulations.gov/comment/FMCSA-2017-0059-0018>.

or hard of hearing. Some applicants have experience operating CMVs prior to failing to meet FMCSA's hearing standard. However, if FMCSA does not consider experience driving personal vehicles, some applicants would be categorically excluded from exemption eligibility and the opportunity to drive a CMV. FMCSA has found from experience that certain drivers who are deaf or hard of hearing and do not have prior CMV driving experience are capable of operating CMVs safely.

The information obtained from each applicant's driving record provides the Agency with details regarding any moving violations or reported crash data, which demonstrates whether the driver has a safe driving history and is used as an indicator of future driving performance. This information assists the Agency in determining whether these drivers pose a risk to public safety and if granting these exemptions would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The driving record is reviewed again when a renewal application is received. The driving record of an applicant for exemption is useful evidence for consideration in the overall process of determining whether to grant an exemption.

FMCSA is not aware of any persuasive data to support the contention that drivers who are deaf or hard of hearing are at an increased crash risk. UPS cited a 2016 study by Gordon and Pearson and stated that hard-of-hearing drivers are up to 3.1 times more likely to be involved in an accident. However, the study's own authors "recognized that the data sets did not completely address [deaf and hard-of-hearing] drivers in a robust manner, and further data mining may lead to differing results."⁶ FMCSA notes that the study has further limitations because the data only reflect crash involvement and not crash fault. In addition, the crashes occurred while driving on a college campus, which may not reflect driving on the whole or may include more younger drivers, who typically

⁶ Gordon and Pearson at 51.

have higher crash rates. With respect to the 2020 study by Hickman et al.,⁷ UPS mischaracterized the study as an “analysis of [FMCSA’s] hearing-exemption program.”⁸ The study was not such an analysis. The report provides, “[o]nly 72 drivers (0.5 percent) failed the hearing exam. Waiver information for driver exemptions for the hearing standard are not reflected in these results.”⁹ Furthermore, the results related to the driver meeting or failing to meet FMCSA’s hearing standard were not statistically significant; therefore, no conclusions can be drawn regarding the hearing standard as it relates to safety.¹⁰

FMCSA also does not accept the efforts by the commenters to offer a broad objection to all exemptions to the hearing standard in § 391.41(b)(11). As explained above, FMCSA finds that there is sufficient evidence to support a finding that such exemptions generally satisfy the statutory standard in 49 U.S.C. 31315(b)(1). The Agency is not engaging in an experiment with safety; rather, the Agency is exercising the discretion provided by Congress to grant exemptions. Moreover, the Agency’s decision to exercise its discretion and grant the exemptions is not arbitrary or capricious. Therefore, the Agency will continue to consider each application for a hearing exemption on an individual basis and will continue exempting those drivers who do not pose a risk to public safety when granting the exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.

UPS stated that it has adopted a policy that it will not accept the Medical Examiner’s Certificates that must be accompanied by hearing exemptions. FMCSA recognizes that the FMCSRs provide in § 390.3T(d) that nothing in 49 CFR parts 350 through 399 is to be construed to prohibit an employer, such as UPS, from requiring and

⁷ Hickman J, Mabry J, Marburg L, Guo F, Huiying M, Hanowski R, Whiteman J, and Herbert W., *Commercial Driver Safety Risk Factors* (Report No. FMCSA-RRR-17-014), Washington, DC: FMCSA 2020, available at <https://rosap.ntl.bts.gov/view/dot/49620> (last accessed Dec. 12, 2022).

⁸ UPS comment at 14.

⁹ Hickman et al. at 40.

¹⁰ Id. Tables 106 and 108 at 126 and 128.

enforcing more stringent requirements relating to safety of operation and employee safety and health.

CVTA in essence is renewing the global comments relating to the standards and bases FMCSA uses in determining whether to grant exemptions from the hearing standards that it provided on October 21, 2015 in response to a *Federal Register* notice announcing applications for exemptions from the hearing requirement in the FMCSRs. FMCSA has already responded to and addressed those comments in a *Federal Register* notice published on December 29, 2017 (82 FR 61809). FMCSA has no basis for reconsidering its treatment of the matters raised previously by CVTA.

FMCSA acknowledges CVTA's concerns about the challenges driver training schools may experience delivering services for hearing impaired drivers. In granting these exemptions, however, FMCSA focuses on whether these individuals are physically able to safely operate a CMV in interstate commerce. Matters concerning the training of deaf or hard of hearing individuals to operate CMVs are beyond the scope of the medical exemptions being granted and are not evidence that FMCSA should no longer grant exemptions from its hearing standard. FMCSA notes there are CDL training schools that have successfully trained deaf and hard of hearing drivers and State driver's licensing agencies have found ways to conduct CDL skills tests for such individuals. FMCSA believes that it is not necessary for FMCSA to "provide a consistent standard" for training and testing activities when considering an application for an exemption from the hearing standard.

As indicated above, the focus in these consolidated proceedings is to determine whether to renew exemptions from FMCSA's hearing standard for the applicants. Therefore, it is not necessary for FMCSA to address other driver qualification requirements in this proceeding. Those requirements are addressed by other provisions of the FMCSRs and not by the physical qualification standards.

FMCSA does not find any of the evidence or contentions presented by UPS persuasive enough to cause it to rescind Mr. Murphy's exemption. It also finds that CVTA's concerns about the supposed difficulties of training CDL drivers with a hearing exemption do not warrant denying any of the renewal applications for such exemptions. Finally, there is a basis to renew Mr. Queen's exemption because he has been examined by a medical examiner and found to satisfy FMCSA's physical qualification standards, except for the hearing standard.

IV. Conclusion

Based upon its evaluation of the 24 renewal exemption applications, FMCSA announces its decision to exempt the following drivers from the hearing requirements in § 391.41 (b)(11).

As of August 22, 2022, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following 24 individuals have satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers:

Mataio Brown (MS)	Robert Burnett (AZ)	Barry Carpenter (SD)
Lyle Eash (VA)	Buddy Gann (IN)	Jeremy Lampard (SC)
Michael McCarthy (MN)	Quinton Murphy (WI)	Michael Murrah (GA)
Karl Ortiz (MO)	Christopher Poole (OH)	Ricardo Porras-Payan (TX)
Kelly Pulvermacher (WI)	James Queen (FL)	James Redmond (IL)
Willine Smith (GA)	Brandon Soto (MO)	Darren Talley (NC)
Michael Tayman (ME)	Carlos Torres (FL)	Joshua Weaver (GA)
James Weir (AZ)	Joseph Woodle (KY)	Paul Wentworth (WA)

The drivers were included in docket numbers FMCSA-2012-0332, FMCSA-2013-0122, FMCSA-2013-0123, FMCSA-2013-0124, FMCSA-2015-0326, FMCSA-2015-0328, FMCSA-2015-0329, FMCSA-2016-0004, FMCSA-2017-0058, FMCSA-2017-0059, FMCSA-2017-0060, FMCSA-2017-0061, FMCSA-2018-0135, or

FMCSA-2018-0138. Their exemptions were applicable as of August 22, 2022 and will expire on August 22, 2024.

In accordance with 49 U.S.C. 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) the person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136, 49 U.S.C. chapter 313, or the FMCSRs.

Larry W. Minor,
Associate Administrator for Policy.

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